NO. 85-222

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

WAYNE K. BAKER, individually and
d/b/a BAKER COAL COMPANY,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

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30 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the provisions of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §1201 *et seq.*, at § 1268(c), which requires that a person seeking formal review of a civil penalty assessed by the Secretary of Interior forward the proposed amount of the penalty for deposit in Escrow pending review, is unconstitutional?

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STATEMENT OF CORPORATE AFFILIATION

Petitioner, Wayne K. Baker, d/b/a Baker Coal Company, states that: it is not a subsidiary or affiliate of a publicly-owned corporation; and there is no publicly-owned corporation, not a party to this appeal, that has a financial interest in the outcome of this appeal.

TABLE OF AUTHORITIES

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CASES

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Gardner v. Commonwealth of Pennsylvania, Department of Public Welfare, 685 F.2d 1106 (3d Cir. 1983). 11

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Matthews v. Eldridge, 424 U.S. 319 (1976) 12, 13

U.S. v. Moore, d/b/a Log Mountain Mining Company, 550 F.Supp 811 (E.D. Tenn. 1982) aff'd 734 F.2d 17 (6th Cir. 1984), Cert. denied,

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STATUTES AND RULES

28 U.S.C. §1254. 5

28 U.S.C. §1291. 9

28 U.S.C. §1331. 9

28 U.S.C. §1345. 9

28 U.S.C. §1355. 9

Surface Mining Control and Reclamation Act of 1977:

30 U.S.C. §§1201 et seq. 6, 8

30 U.S.C. §1268 . . . . . 6, 9

30 C.F.R. §722.15. 13

Third Circuit Court of Appeals Internal Operating Procedure VIII. 11

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OPINIONS DELIVERED BY COURTS BELOW

The following Opinions have been rendered by Courts below:

1. United States Court of Appeals for the Third Circuit: Memorandum Opinion dated June 21, 1985, at No. 84-3710, affirming the grant of summary judgment in favor of the United States by the United States District Court for the Western District of Pennsylvania.

2. United States District Court for the Western District of Pennsylvania: Final Order dated October 2, 1984, granting United States Motion for Summary Judgment at No. 83-2725.

STATEMENT OF GROUNDS ON WHICH JURISDICTION IS INVOKED

Petitioner seeks review of the judgment of the United States Court of Appeals for the Third Circuit dated June 21, 1985. In that decision, the lower Court affirmed the grant of summary judgment by the United States District Court for the Western District of Pennsylvania, which grant was made in favor of the United States of America.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C.§1254 and Supreme Court Rule 17(c).

STATUTES INVOLVED

Petitioner is challenging the constitutionality of §518(c) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201 et seq. The Act §518(c), as codified at 30 U.S.C. §1268(c) provides as follows:

> "(c) Notice of violation; action required of violator; waiver of legal rights.
>
> Upon the issuance of a notice or Order charging that a violation of this chapter has occurred, the Secretary shall inform the operator within thirty (30) days of the proposed amount of said penalty. The person charged with the penalty shall then have thirty (30) days to pay the proposed penalty in full or, if the person wishes to contest either the amount of the penalty or the fact of the violation, forward the proposed amount to the Secretary for placement in an Escrow account. If through administrative or judicial review of the proposed penalty, it is determined that no violation occurred, or that the amount of the penalty should be reduced, the Secretary shall within thirty (30) days remit the appropriate amount to the person, with interest at the rate of six (6%) per cent, or at the prevailing Department of the Treasury rate, whichever is greater. Failure to forward

the money to the Secretary within thirty (30) days shall result in a waiver of all legal rights to contest the violation or the amount of the penalty."

STATEMENT OF THE CASE

On October 31, 1983, the United States of America filed a Complaint against Petitioner, Wayne K. Baker, individually, and d/b/a, Baker Coal Company, seeking collection of civil penalties under the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §1201 et seq. Petitioner filed an Answer and Counterclaim, raising the issue of whether or not §518(c) of the Act was constitutional.

Thereafter, the United States filed a Motion for Summary Judgment in the United States District Court for the Western District of Pennsylvania, on the grounds that there was no genuine issue as to any material fact. Petitioner filed a Brief in response to same. The United States then filed a Motion to Submit Additional Affidavit, which Motion was granted and Request for Admission which Request was timely answered by Petitioner.

On October 2, 1984, the Honorable Donald Ziegler issued a Memorandum Opinion and Order granting the United States Motion for Summary

Judgment. Since said Order is final in nature, Petitioner filed a timely Notice of Appeal to the United States Court of Appeals for the Third Circuit. Subsequent to filing said Appeal, Petitioner requested hearing en banc, which request was denied.

On June 21, 1985, the United States Court of Appeals for the Third Circuit issued a Memorandum Opinion confirming the judgment of the United States Circuit Court for the Western District of Pennsylvania. Petitioner is presently seeking review by this Honorable Court.

The United States of America invoked jurisdiction of the United States District Court for the Western District of Pennsylvania pursuant to 30 U.S.C. §1268(a), 28 U.S.C. §1345, 28 U.S.C. §1355, and 28 U.S.C. §1331. Jurisdiction of the Court of Appeals for the Third Circuit of Pennsylvania was invoked pursuant to 28 U.S.C. §1291.

ARGUMENT

Petitioner submits that the within Writ should be allowed as the Third Circuit Court of Appeals has decided an important question of Federal law which has not been, but should be, settled by this Honorable Court, as provided for in United States Supreme Court Rule 17.1.(c). The provision of the Surface Mining Control and Reclamation Act of 1977 in question, requires that a person seeking formal review of a civil penalty assessed by the Secretary of Interior forward the proposed amount of that penalty for deposit in Escrow pending review.

Although this Court has denied certiorari on the issue herein presented on several previous occasions, most recently in U.S. v. Moore, d/b/a Log Mountain Mining Co., 550 F.Supp 811 (E.D. Tenn. 1982) affirmed 734 F.2d 17 (6th Cir. 1984), Cert. denied at No. 84-41, at 53 U.S.L.W., 3269, Petitioner believes that the constitutionality of §518(c) of the Act is an issue of great importance which should be determined by this Honorable Court. The United States Court of

Appeals for the Third Circuit upheld the constitutionality of §518(c) in Graham v. OSM, 722 F.2d 1106 (3d Cir. 1983)[1]. Therefore, the Court was bound to rule that Graham was controlling of the case at bar, since a panel could not oveturn a governing precedent of the court; Gardner v. Commonwealth of PA D.P.W., 685 F.2d 106 (3d Cir.) cert. denied 459 U.S. 1092 (1982); and Third Circuit Internal Operating Procedures VIII (c), and since Petitioner's request for an en banc hearing was denied (See, Appendix "C"). Therefore, in order to have §518(c) declared unconstitutional, review by this Honorable Court is necessary.

Petitioner submits that the provision of the Act in question, §518(c), violates procedural due process under the Fifth Amendment of the United States Constitution. Due process is violated as the individual is deprived of his property by being required to place an assessed penalty into an Escrow account or

[1]Although other Circuits have upheld that provision's constitutionality, see, e.g., Blackhawk Mining Co., Inc. v. Andrus, 711 F.2d 753 (6th Cir. 1983) and B & M Coal Corp. v. OSM, 699 F.2d 381 (7th Cir. 1983), this Court has never decided this issue of importance.

waive all legal rights under the Act. Said requirement violates the standards set forth in Matthews vs. Eldridge, 424 U.S. 319 (1976), wherein the criteria for determining whether or not procedural protection available to an individual prior to the deprivation of benefits or property are constitutionally sufficient.

The first factor addresses the private rights affected by the official action. The Third Circuit Court of Appeals in Graham vs. OSM, 722 F.2d 1106 (3rd Cir. 1983), found that the private interest of the individual or company involved was "although palpable...not overriding", Graham (supra) at 1111. Petitioner submits that in light of the lengthy process through which administrative proceedings take place, that the private interest of the individual may indeed be overriding. The deprivation of a sum of money for the period of time during which the administrative and appeals proceedings extend, may be sufficient to cause a small business to cease operations.

The second Matthews' (supra) factor is

the risk of erroneous deprivation of the Defendant's interests. Although the Defendant may pursue several levels of administrative review prior to the prepayment (see, 30 U.S.C. §1275(a) and 30 C.F.R. §722.15), such review does not necessarily insure that the Defendant will not be deprived of his financial and business interests. Even assuming that the Defendant's financial interests are protected by the regulatory provisions, there is no provision for the protection of the operator's business interests during the administrative process. To the contrary, the length and intensity of administrative process may create permanent injuries to the operator's reputation and ability to conduct his business, for which injury the regulations provide no means of restoring.

Finally, the last factor enunciated in Matthews (supra) is the government's substantial interest in prompt assessment and collection of penalties in order to insure compliance with the Act. While the prepayment provision

indeed insures that the government will promptly assess and collect penalties, it is not so clear that it provides an opportunity to be heard "at a meaninful time and in a meaningful manner," as is required under procedural due process. See, Graham (supra) at page 1111 citing, Armstrong vs. Manzo, 380 U.S. 545, 552 (1965). Petitioner submits that in order to be heard at a meaningful time and in a meaningful manner, the hearing must be provided at the early stages of the penalty assessment and that no portion of the administrative review process should require a prepayment of funds. All appeals to the court are precluded if the administrative review is not exhausted, and in order to exhaust the administrative remedies, the prepayment of funds is required by the Act; therefore, the entire Court system and a significant phase of the administrative review process is unavailable to the operator unless he prepays the penalty. Petitioner submits that this preclusion constitutes a denial of procedural due process.

Finally, the requirements of the Act are unduly burdensome for the small business man and do not adequately insure that he will be heard at a meaningful time and in a meaningful manner. The operator is denied all access to legal remedies, including the Court system, if he does not prepay the penalty; therefore, his opportunity for a fair and impartial hearing and his opportunity to have his "day in Court" are summarily denied.

APPENDIX

A. Copy of Memorandum Opinion dated June 21, 1985, issued by the Third Circuit Court of Appeals.

B. Copy of the Opinion granting Summary Judgment issued on October 2, 1984, by the United States District Court.

C. Copy of the Order denying Appellant's Petition for En Banc hearing dated March 4, 1985.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-3710

UNITED STATES OF AMERICA

v.

WAYNE K. BAKER, Individually and
d/b/a BAKER COAL COMPANY,
Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 83-2725)
District Judge: Hon. Donald E. Ziegler

Submitted Under Third Circuit Rule 12(6)
June 21, 1985
Before: ALDISERT, Chief Judge, GIBBONS,
Circuit Judge and BECHTLE,
District Judge*

(Opinion Filed: June 21, 1985)

MEMORANDUM OPINION OF THE COURT

---

*Hon. Louis C. Bechtle, United States District Judge for the Eastern District of Pennsylvania, sitting, by designation.

GIBBONS, Circuit Judge:

Wayne K. Baker appeals from a summary judgment in favor of the United States on its claim for collection of civil penalties assessed under the Surface Mining Control and Reclamation Act, 30 U.S.C. § 1201 et seq. (1982). Baker contended in the district court, and contends here, that section 518(c) of the Act, 30 U.S.C. § 1268(c), which requires that a person seeking formal review of a civil penalty assessed by the Secretary of the Interior forward the proposed amount of the penalty for deposit in escrow pending review, is unconstitutional. That contention is precluded, for this panel, by the decision in Graham v. Office of Surface Mining Reclamation and Enforcement, 722 F.2d 1106 (3d Cir. 1983).

The United States contends that in light of the Graham decision the appeal is so patently frivolous that attorneys' fees should be assessed against Baker. We reject that contention, since only by appealing could Baker seek reconsideration of Graham by the full court.

The judgment appealed from will be affirmed.

TO THE CLERK OF THE COURT:

Kindly file the foregoing Memorandum Opinion.

/s/
Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA, Plaintiff,	)	
v.	)	Civil Action No. 83-2725
WAYNE K. BAKER d/b/a BAKER COAL COMPANY, Defendant.	)	

MEMORANDUM OPINION

ZIEGLER, District Judge

(1) The United States brought this action against defendant to collect civil penalties assessed by the Department of the Interior, Office of Surface Mining Reclamation and Enforcement (OSM) for two violations of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §1201 et seq. Pending before the court is the government's motion for summary judgment.

(2) Jurisdiction is predicated on 30 U.S.C. §1268(d), 28 U.S.C. §1345, and 28 U.S.C. §1355.

(3) Defendant conducted surface coal mining and reclamation operations in Fayette County, Pennsylvania at all times relevant to

this action.

(4) After inspecting defendant's business premises on March 16, 1982, OSM Inspector John D. Skinner issued Notice of Violation No. 82-1-99-2 for failure to restore disturbed areas to their previous condition.

(5) Inspector Skinner again inspected defendant's operations on June 14, 1982 and issued Cessation Order No. 82-1-99-1 on the following day for failure to abate the violation cited in his previous inspection.

(6) On July 27, 1982, the Office of Surface Mining sent Notices of Proposed Assessment of Civil Penalty for the Notice of Violation and the Cessation Order. The proposed penalties are $460 and $22,500 respectively. A cover letter included with the Notices of Proposed Assessment informed defendant that he had the right to request an informal conference within 15 days or a formal hearing within 30 days. Those who desire a hearing must deposit with the Secretary an amount equal to the total proposed assessment. The deposit is placed into

an escrow account until a decision is rendered.

(7) Defendant neither requested a conference or hearing nor deposited any funds into escrow within 30 days after the Notices of Proposed Assessment.

(8) Failure to deposit into escrow the total proposed penalty within 30 days after the Notice of Proposed Assessment results in a waiver of all legal rights to contest the violation or the amount of the penalty. 30 U.S.C. § 1268(c).

(9) When no payment was forthcoming, OSM issued a Final Order of Civil Penalty Assessment for both violations on September 16, 1982 which gave defendant 30 more days to pay the penalties. On October 1, 1982 OSM sent a Final Demand Letter for both violations allowing 15 days for payment.

(10) Attached to the government's motion for summary judgment are signed return receipts for each mailing to defendant. The receipts are signed by one B. Greenwood or Barb Greenwood.

(11) Defendant does not allege and the

record is devoid of evidence that defendant responded to any of these communications or forwarded the penalty assessed to the Secretary to be held in escrow.

(12) The defendant opposes the government's motion for summary judgment on two grounds. First, he contends that a genuine issue of material fact exists as to whether the government provided adequate notice of the violations. Second, defendant attacks the constitutionality of 30 U.S.C. §1268(c) which waived his rights to contest the violation and the amount of the penalty when he failed to pre-pay the assessed penalties. Both contentions lack merit.

(13) Defendant asserts that the return receipts offered by the government are insufficient to prove notice because none are signed by Wayne K. Baker or the Baker Coal Company. Defendant further assails the government's failure to present evidence identifying B. Greenwood or that individual's relationship to the Baker Coal Company.

(14) Rule 56(e), Fed. R. Civ. P., provides

in part:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations of his pleading, but his response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Therefore the party opposing the motion may not "rely merely upon bare assertions, conclusory allegations or suspicions." Fireman's Insurance Company of Newark, New Jersey v. DuFresne, 676 F.2d 965, 969 (3d Cir. 1982): See also Ness v. Marshall, 660 F.2d 517, 519 (3d Cir. 1981); Robin Construction Co. v. United States, 345 F.2d 610, 614-15 (3d Cir. 1965).

(15) Defendant filed no affidavits or other evidence in opposition to plaintiff's motion. If defendant did not receive notice or if B. Greenwood is not authorized to sign for certified mail on behalf of the Baker Coal Company, such facts could easily have been set forth in an appropriate affidavit. We hold that no genuine issue of material fact exists as to defendant's

notice of the violations.

(16) As to defendant's second contention, that the prepayment procedures required by 30 U.S.C. § 1268(c) violate due process and equal protection, we observe that this question has been litigated on numerous occasions. Most recently, in Graham v. Office of Surface Mining Reclamation and Enforcement, 722 F.2d 1106 (3d Cir. 1983), the Court of Appeals held that § 1268(c) was constitutional. Other courts which have considered the issue agree that § 1268(c) violates no constitutional principle. Blackhawk Mining Co. v. Andrus, 711 F.2d 753 (6th Cir. 1983); B & M Coal Corp. v. Office of Surface Mining Reclamation and Enforcement, 699 F.2d 381 (7th Cir. 1983), affirming 531 F.Supp. 677 (S.D. Ind. 1982); United States v. Crooksville Coal Co., 566 F.Supp. 141 (S.D. Ohio 1982); John Walters Coal Co. v. Watt, 553 F.Supp. 838 (E.D. Ky. 1982); United States v. Thompson Brothers Coal Co., 532 F.Supp. 979 (W.D. Pa. 1982), rev'd on other grounds, 696 F.2d 985 (3d Cir. 1982). Therefore, defendant's

challenge to the constitutionality of § 1268(c) must be rejected.

(17) There being no genuine issue of material fact, we find that plaintiff is entitled to judgment as a matter of law.

A written order will be filed with the Clerk.

/s/ Donald E. Ziegler
Donald E. Ziegler
United States District Judge

cc: Lloyd A. Cook, Esq.
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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	Civil Action 83-2725
WAYNE K. BAKER d/b/a BAKER COAL COMPANY, Defendant.	)	

ORDER OF COURT

AND NOW, this 2nd day of October, 1984,

IT IS ORDERED that the motion of plaintiff for summary judgment be and hereby is granted.

/s/ Donald E. Ziegler
Donald E. Ziegler
United States District
Judge

cc: Lloyd A. Cook, Esq.
Joel B. Strauss, Esq.
Simon B. John, Esq.

UNITED STATES COURT OF APPEALS FOR THE
THIRD CIRCUIT

No. 84-3710 March 4, 1985

UNITED STATES OF AMERICA
vs.
WAYNE K. BAKER, individually and d/b/a
BAKER COAL COMPANY, Appellant
(W.D. D.C. Civil 83-2725)

Present: ALDISERT, Chief Judge, SEITZ, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, and BECKER, Circuit Judges.

1. Appellant's petition for en banc hearing,

in the above-entitled case.

Respectfully,

/s/ Valerie Young
Deputy Clerk 7-3080

enc.
vy

The foregoing Motion is/~~XXX~~ denied.

By the Court,

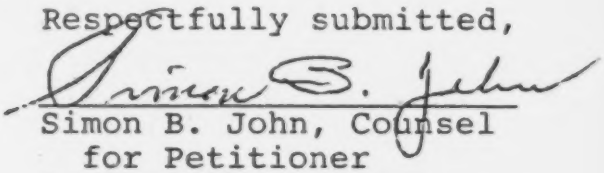
/s/ Aldisert
Chief Judge

Dated: March 18, 1985
vy/cc SBJ
(EJD, DCS
AFO'C
BMG

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,



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DATED: August 8, 1985